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August 25, 2004

Mrs. Blanca S. Bayó
Director, Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 040527-TP
BellSouth v. NuVox

Dear Ms. Bayó:

By this letter, BellSouth Telecommunications, Inc. ("BellSouth") requests that the Commission officially recognize the decision of the North Carolina Utilities Commission in *In the Matter of BellSouth v. NewSouth Communications Corp., Order Granting Motion for Summary Disposition and Allowing Audit*, Docket No. P-772, Sub 7, dated August 24, 2004 (attached). The NCUC's decision bears directly on the issues raised in NuVox's pending Motion to Dismiss.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White /v.f.

Nancy B. White

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 040527-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 25th day of August, 2004 to the following:

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Nancy B. White/VF.
Nancy B. White

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 7

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of BellSouth Telecommunications, Inc. Complainant	)	
v.	)	ORDER GRANTING MOTION FOR SUMMARY DISPOSITION AND ALLOWING AUDIT
NewSouth Communications, Corp. Respondent	)	

BEFORE: Chairman Jo Anne Sanford, Commissioners J. Richard Conder, Robert V. Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II, and Michael S. Wilkins

BY THE COMMISSION: This matter arises on Complaint filed by BellSouth Telecommunications, Inc. ("BellSouth") requesting the Commission to find that NewSouth Communications Corp. ("NewSouth") breached the parties' Interconnection Agreement ("Agreement") by refusing to allow BellSouth to conduct an audit of NewSouth's enhanced extended loops ("EELs") in order to verify NewSouth's self-certification that the EEL facilities are being used to provide "a significant amount of local exchange service." Alternatively, and only if the Commission deems it necessary, BellSouth requests the Commission to find that NewSouth violated the terms of the Federal Communication Commission's ("FCC's") *Supplemental Order Clarification* (SOC)[1] and 47 U.S.C. § 251 by refusing to allow BellSouth to audit NewSouth's EELs. The Complaint further prays that NewSouth be compelled to allow BellSouth's auditor to conduct an audit of the NewSouth EELs. Simultaneously with its Complaint, on November 25, 2003, BellSouth filed a motion for summary disposition, arguing that a hearing in this matter is not necessary for the Commission to rule on the parties' rights under the Agreement and the applicable law. NewSouth filed its Answer to Complaint on December 29, 2003, denying BellSouth's unqualified right to the audit it seeks and also opposing summary disposition. BellSouth replied to NewSouth's Answer and Opposition to the Complaint and Request for Summary Disposition.

Pursuant to the Commission's *Order* dated February 9, 2004, the Public Staff filed comments on March 8, 2004, and both BellSouth and NewSouth filed responsive comments on March 31, 2004. On May 4, 2004, NewSouth filed a request for oral argument on the issue of whether disputed material facts exist and require an

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[1] *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Supplemental Order Clarification,* 15 FCC Rcd 9587 (2000).

evidentiary hearing. BellSouth filed a response on May 10, 2004, re-asserting that an evidentiary hearing is not needed as there are no material issues of fact in dispute, but stating that it does not oppose an oral argument if it would be helpful to the Commission. BellSouth requests that any oral argument also address whether it is entitled to audit NewSouth's EELs under the Agreement.

ISSUE: Is BellSouth entitled to conduct an audit of NewSouth's EELs under Section 4.5.1.5 of Attachment 2 of the Agreement?

Positions of the Parties

BELLSOUTH: BellSouth argues that it seeks to enforce audit rights pursuant to Attachment 2, Section 4.5.1.5 of the Agreement, which provides BellSouth the unqualified right, upon providing NewSouth 30 days prior notice, to audit NewSouth's EELs to verify the amount of local exchange traffic being transmitted on EEL circuits. BellSouth maintains that the SOC is not incorporated into the pertinent audit provisions and that the parties never intended such result. Because BellSouth's audit rights are a matter of contract interpretation, BellSouth argues that the matter should be decided as a matter of law without an evidentiary hearing. Alternatively, if the Commission finds that the SOC is incorporated into the Agreement and controls the manner in which BellSouth may exercise its audit rights, BellSouth asserts that it has complied with all SOC audit-related provisions and that summary disposition is still appropriate because the relevant facts are undisputed. BellSouth's position is that it is entitled to conduct an audit of NewSouth's EELs under the terms of the Agreement and, alternatively, under the SOC.

NEWSOUTH: In opposition to BellSouth, NewSouth argues that the Agreement incorporates the SOC and that the requirements of the SOC limit BellSouth's audit rights to (1) non-routine audits, (2) based on a reasonable concern regarding NewSouth's compliance with EEL eligibility and self-certification criteria, and (3) conducted by an independent auditor. NewSouth disputes that BellSouth has met or demonstrated that it has met any of the three SOC requirements. According to NewSouth, it has submitted evidence tending to show that material issues of fact remain, thereby requiring the Commission to afford the parties an evidentiary hearing prior to deciding the merits of the Complaint. NewSouth maintains that BellSouth is not entitled to conduct an audit of its EELs on the facts now before the Commission.

PUBLIC STAFF: The Public Staff agrees that the question of whether the SOC is incorporated into the Agreement can be decided by the Commission as a matter of law without the need for a hearing. However, the Public Staff, agreeing with NewSouth, believes that under the law of Georgia, which is the applicable law governing interpretation of the Agreement, the SOC is incorporated into the Agreement as part of existing law at the time the parties entered into the Agreement. The Public Staff further believes that the SOC, and in turn the Agreement, requires BellSouth to have a concern before being permitted to audit NewSouth's EELs. Because the Public Staff reads BellSouth's Complaint, Para. 47, Jerry Hendrix' affidavit (Complaint, Exhibit E), and

BellSouth's June 6, 2002 letter to NewSouth (NewSouth Answer, Exhibit G) to contain expressions of BellSouth's concerns concerning the accuracy of NewSouth's statements of compliance with EEL eligibility criteria, it disagrees with NewSouth and maintains that BellSouth has met the SOC's "concern" requirement. Therefore, the Public Staff believes it is unnecessary for the Commission to consider further evidence regarding the legitimacy of BellSouth's stated concerns. On the question of whether the auditor selected by BellSouth is sufficiently independent to meet the SOC requirement that an EEL audit be conducted by an independent auditor, the Public Staff, in agreement with BellSouth, believes this requirement has been met since the selected auditor is not related to, affiliated with, subject to the influence or control of, or dependent on BellSouth (Complaint, Exhibit E, Hendrix affidavit). Accordingly, the Public Staff recommends that the Commission find that BellSouth satisfied the conditions to invoke its audit right under the Agreement and order NewSouth to submit to the audit within 45 days of the Commission's order.

DISCUSSION

The Commission has jurisdiction over the matters raised in BellSouth's Complaint pursuant to Sections 251 and 252 of the federal Telecommunications Act of 1996 (47 U.S.C §§ 251, 252), N.C.G.S. §§ 62-30, 62-31, 62-73 and Commission R1-9.

The undisputed facts shown in the filings of record and the related Commission docket regarding the Agreement (P-55, Sub 1305, Renegotiated Interconnection Agreement with NewSouth Communications Corp.) are summarized hereinbelow.

After the FCC's June 2, 2000 release of the SOC, BellSouth, an incumbent local exchange carrier ("ILEC"), and NewSouth, a competing local provider ("CLP"), entered into the Agreement on May 18, 2001. The Agreement was voluntarily negotiated pursuant to Section 252 of the Telecommunications Act of 1996 ("the Act") and was approved by the Commission on September 28, 2001. Section 18 of the General Terms and Conditions of the Agreement provides that the Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Georgia. While the Table of Contents for the Agreement indicates the inclusion of a provision entitled, "Compliance with Applicable Law," such clause does not appear in the body of the Agreement. However, Attachment 2 of the Agreement (which, according to its Section 1.1, contains the terms and conditions specifically applicable to the unbundled network elements ("UNEs") and combinations of such elements being offered by BellSouth pursuant to the Agreement) provides in Section 1.5 that combinations of network elements will be provided "subject to applicable FCC Rules and Orders." Section 4.2 of Attachment 2 of the Agreement provides:

> Where necessary to comply with an effective Commission and/or State Commission order, or as otherwise mutually agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL") as defined in Section 4.3 below.

When the Complaint was filed, the Agreement had been amended on three occasions, the last time being on January 16, 2003, to provide NewSouth access to additional EELs. All amendments were approved by Commission Order.

The Agreement further provides that NewSouth may not convert special access services to combinations of loop and transport network elements unless the combinations are used to provide a particular customer with "a significant amount of local exchange service" as defined by the FCC in Paragraph 22 of the June 2, 2000 SOC, which the Agreement expressly incorporates by reference (Agreement, Attachment 2, §§ 4.5.1, 4.5.1.2). Section 4.5.1.2 also provides that when NewSouth requests conversion of special access circuits to EELs, NewSouth must self-certify in the manner established by the FCC in the SOC that the circuits qualify for conversion. Section 4.5.1.5 of Attachment 2 of the Agreement provides:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage option referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport elements. If based on its audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in the Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

Section 4.5.2.2 of Attachment 2 of the Agreement provides:

> Upon request from NewSouth to convert special access circuits pursuant to Section 4.5.2, BellSouth shall have the right, upon 10 business days notice, to conduct an audit prior to any such conversion to determine whether the subject facilities meet local usage requirements set forth in Section 4.5.2. An audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order, except as expressly modified herein.

On April 26, 2002, BellSouth sent a letter by email and overnight delivery, notifying NewSouth of its intent to conduct an audit of NewSouth's EELs beginning on May 27, 2002. In the letter, BellSouth purported to have provided notice and selected an independent auditor, American Consultants Alliance ("ACA"), in accordance with the SOC. The letter also indicated that the local usage requirements to be verified by audit are those stated in the SOC and that BellSouth had forwarded a copy of the letter/notice to the FCC as required in the SOC. To date, BellSouth has not conducted any audit of NewSouth's EELs since the parties executed the Agreement.

On May 3, 2002, NewSouth responded to the notice indicating that it would work with BellSouth to facilitate the requested audit of EELs that had been converted from special access circuits. However, three weeks later on May 23, 2002, NewSouth sent another letter to BellSouth stating that it disputed BellSouth's notice of intended audit. NewSouth complained that BellSouth's notice of audit did not meet certain requirements of the SOC and advised BellSouth to follow the procedures in the Agreement's Dispute Resolution clause if it still wanted to conduct an audit. By letter dated June 6, 2002, BellSouth replied, generally stating that it had met the requirements questioned by NewSouth. The June 6 letter also provided reasons for BellSouth's desire to verify NewSouth's local usage certifications. After receiving no response, BellSouth sent another letter on June 27, 2002, indicating that in the absence of response it planned to commence an audit on July 15. This time NewSouth responded by letter dated June 29 that it did not agree to permit BellSouth to audit its EELs. BellSouth again responded to concerns raised by NewSouth and, in a letter dated July 17, 2002, stated that it had not only complied with the audit provisions of the Agreement but had also made an effort to comply with all FCC rules on audits, though these rules had not been incorporated into the Agreement.

The companies continued to exchange correspondence over the next year, but neither party substantially changed its position. BellSouth continued to state it had a right to audit NewSouth's EELs and that it had met the requirements of both the Agreement and the SOC, while NewSouth continued to dispute BellSouth's entitlement to an audit based on its position that BellSouth had not met the audit requirements of the SOC.

Before examining NewSouth's arguments that BellSouth has not met specific requirements of the SOC, the Commission must first determine whether the requirements of the SOC are incorporated into the Agreement or otherwise apply to BellSouth's audit rights. Having reviewed the relevant provisions of the Agreement, the pleadings, and the parties' briefs and comments, including all attached exhibits and affidavits, the Commission concludes that the parties did not expressly incorporate the SOC into the Agreement and that the parties agreed that the EEL audit provisions of Attachment 2 of the Agreement would govern EEL audits.

The Agreement provides that the laws of the State of Georgia shall govern construction of the Agreement. North Carolina courts have recognized the validity of such choice of law provisions. *Behr v. Behr,* 46 N.C. App. 694, 266 S.E.2d 393 (1980). Therefore, the Commission will construe the Agreement in accord with Georgia law. Under Georgia law, contract construction is initially a matter of law for the court. *Schwartz v. Harris Waste Management Group,* 237 Ga. App. 656, 516 S.E.2d 371 (1999). If the contract language is clear and unambiguous, the court must enforce the contract according to its terms. *Id.* The court must determine whether the contract is clear and unambiguous by looking to the contract alone for its meaning. *Id.* Section 4.5.1.5 of Attachment 2 of the Agreement provides BellSouth the right to audit NewSouth's EELs as stated:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage option referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport elements.

The cited language is unambiguous and provides BellSouth the right to audit NewSouth's records at BellSouth's expense on thirty days prior notice, but not more than once in a twelve month period, unless a previous audit reveals non-compliance with the specified local usage option. There are no other restrictions in the Agreement on when BellSouth can initiate and conduct an audit of NewSouth's EELs.

While NewSouth and the Public Staff argue that a precatory statement in footnote 86 of the SOC imposes additional conditions on BellSouth's entitlement to an audit, the Commission does not agree. Even if NewSouth's interpretation of the SOC is correct, the Agreement, not the SOC, governs when BellSouth is entitled to an audit. The Agreement was negotiated pursuant to Section 252(a)(1) of the Act which permits the parties to enter voluntarily negotiated interconnection agreements without regard to the standards of subsections (b) and (c) of Section 251 of the Act. The FCC has acknowledged that 252(a)(1) extends to FCC rules and orders and means that parties entering negotiated agreements need not comply with FCC requirements established pursuant to 251(b) and (c).[2] The SOC was issued by the FCC in connection with the establishment of rules regarding the unbundling obligations of Section 251(c). Moreover, the FCC stated in the SOC, ¶ 32, that where "interconnection agreements already contain audit rights, [w]e do not believe that we should restrict parties from relying on these agreements." Hence, it follows that the parties were free to negotiate and agree upon terms for their interconnection agreement that were different from any stated requirements of the SOC. Having entered into the Agreement, the parties' dealings are now governed by the specific terms of the Agreement and not the general provisions of Sections 251 and 252 of the Act or FCC rulings and orders issued pursuant to the stated sections. Accordingly, pursuant to Section 4.5.1.5 of Attachment 2 of the Agreement, BellSouth is entitled to audit NewSouth's EELs on 30 days prior notice, provided that BellSouth pays for the audit and has not conducted such an audit within a twelve-month period. Because the Agreement clearly addresses the issue of when BellSouth is entitled to conduct an audit, there is no need to look to the SOC for other possible requirements regarding when BellSouth may audit NewSouth's EELs.

NewSouth has argued that the Agreement itself incorporates the provisions of Sections 251 and 252 of the Act. The Commission rejects this argument. NewSouth generally points to the Agreement's preamble or "Witnesseth" section and Section 1.0 of the Agreement's General Terms and Conditions as proof of the parties' intent that the Agreement incorporated and would be subordinate to Sections 251 and 252. However, these passing references to 251 and 252 are the normal "boilerplate" references included to explain the reason the parties are entering into an interconnection

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15527-30 ¶¶ 54, 58 (1996).

agreement. That is to say, execution of an interconnection agreement satisfies the parties' obligations under 251 and 252 and that is the reason the parties have chosen to enter into the Agreement—to meet their statutory obligations. The Commission's approval of the Agreement and amendments to the Agreement supports the parties' statement that the Agreement meets their 251 and 252 obligations. The Commission's approval is in essence a ruling that the Agreement complies with the requirements of Sections 251 and 252 of the Act. *See* 47 U.S.C. § 252.

In addition, the provisions of the "Witnesseth" section and Section 1.0 of the General Terms and Conditions are general and broadly inclusive. To the extent these general provisions may create an ambiguity or conflict with the audit provisions of Section 4.5.1.5, the Supreme Court of Georgia has held:

> If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former.

Central Georgia Electric Membership Corp., 217 Ga. 171, 173-74, 121 S.E.2d 644, 646 (1961) (quoting 3 Corbin, p.176, Contracts §547). The Court of Appeals of Georgia has upheld this principle numerous times, stating that "when a provision specifically addresses the issue in question, it prevails over any conflicting general language." *Tower Projects, LLC v. Marquis Tower, Inc.*, __ Ga. App. __, 2004 WL 859165 (2004); *Deep Six, Inc. v. Abernathy*, 246 Ga. App. 71, 538 S.E. 2d 886 (2000); *Schwartz*, 237 Ga. App. at 661, 516 S.E.2d at 375. Therefore, inasmuch as the audit provisions of the Agreement before the Commission come after the cited general provisions and specifically address the issue of when BellSouth is entitled to audit NewSouth's EELs, the audit provisions of the Agreement prevail over the general clauses.

NewSouth has further argued that Section 1.5 of Attachment 2 of the Agreement incorporates the provisions of the SOC. Again, the Commission disagrees with NewSouth. There is no express language in the Agreement that incorporates the SOC in its entirety into the Agreement. NewSouth relies on the language of Section 1.5, which states, "[s]ubject to applicable and effective FCC Rules and Orders as well as effective State Commission Orders, BellSouth will offer combinations of network elements pursuant to such orders." However, Section 1.1 of Attachment 2 provides that BellSouth agrees to offer to NewSouth unbundled network elements obligated to be provided under Section 251(c)(3) of the Act, and states that "[t]he **'specific'** terms and conditions that apply to the unbundled network elements are described below in this Attachment 2" (emphasis added). The Commission concludes that Section 1.1 sets forth the purpose of the entire Attachment 2—to "set forth" the UNEs and combinations of UNEs that BellSouth will offer in accordance with its obligations under the Act. Section 1.5 then fulfills this purpose statement in Section 1.1 by specifically setting forth and identifying the UNEs and UNE combinations that BellSouth will offer. Although Section 1.5 begins with a statement that BellSouth will offer combinations of UNEs subject to applicable and effective FCC Rules and Orders, this statement cannot be

properly construed without reading it in light of Section 1.1. Section 1.1 expressly states a further purpose of Attachment 2—to describe the "specific terms and conditions that will apply to [UNEs]" that are offered.

The statement that Attachment 2 will describe the terms and conditions applicable to UNEs offered under the Agreement is express recognition of the parties' intent to agree (under § 252(a)(1) of the Act) to terms not identical to the language of § 251 of the Act. Section 1.5 does not override the specific statement in Section 1.1 providing that Attachment 2 contains the terms applicable to the provisioning of UNEs. With regard to audit rights, Section 4.5.1.5 of Attachment 2 specifically and unambiguously addresses when BellSouth is entitled to audit NewSouth's EELs. To the extent that the more general "subject to" language of 1.5 creates any ambiguity or conflicts with the subsequent section on audits, the audit provisions are specific on the issue at hand and they prevail. Moreover, though the FCC's SOC may apply generally to the provisioning of UNEs as a result of the language in 1.5, the SOC itself plainly states that the FCC does not believe it should restrict parties from relying on audit provisions contained in negotiated interconnection agreements. Clearly, the FCC did not intend the SOC to negate or take the place of specific audit provisions of interconnection agreements and thus, this Commission will not read the SOC to do so even if the SOC generally applies to the Agreement through the terms of Section 1.5.

NewSouth has also argued that the general principle that agreements are interpreted in light of the body of law existing at the time agreements are executed is part of Georgia law. NewSouth applies this principle by arguing that the entire SOC, as part of the existing law at the time the Agreement was executed, must be read into the Agreement, and that the parties would have had to have included an express statement excluding the SOC from the Agreement if they wanted to be relieved from the requirements and restrictions of the SOC. The Commission does not agree. Under Georgia law, contracts are interpreted in light of existing law and each case cited by NewSouth for this premise is in agreement with this proposition. However, none of the cases cited by NewSouth support the premise that all existing law is read into the parties' contract by operation of law, unless the parties expressly exclude it.[3] To the

[3] Both NewSouth and the Public Staff have noted and relied on the holding of the Georgia Public Service Commission ("GPSC") in *In Re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. 12778-U, Order (July 6, 2004). In *Nuvox*, the GPSC, on facts similar to those in the instant case, found the SOC was incorporated in the parties' interconnection agreement by law. The GPSC cited *Jenkins v. Morgan*, 100 Ga. App. 561, 112 S.E. 2d 23 (1959) for the premise that "if the parties intend to stipulate that their contract not be governed by existing law, then the other legal principles to govern the contract must be expressly stated therein." GPSC Order at 6. The GPSC then went on seemingly to require not only that other legal principles be expressly stated in the parties' contract, but that there be an express statement or stipulation that the contract will be governed by principles other than existing law if the parties so intend. The Commission believes *Jenkins* has been misconstrued. The *Jenkins* court held the parties were "presumed to contract under existing laws, and no intent will be implied to the contrary unless so provided by terms of their agreement." *Jenkins*, 100 Ga. App. at 562, 112 S.E.2d at 23. *Jenkins* does not require language expressly stating that the parties want to be governed by other than the existing law. *Jenkins* merely holds that existing law will control unless the express terms of the agreement show the parties' intent to establish terms that are different from the existing law. Additionally, the GPSC's discussion of and heavy

contrary, Georgia law requires contracting parties to abide by applicable existing law, but only as to those matters not specifically addressed in the parties' voluntarily negotiated agreements. *Jenkins v. Morgan,* 100 Ga. App. 561, 112 S.E. 2d 23 (1959). Georgia courts recognize that if the parties are silent on an issue, existing law will apply, but that the parties are free to contract otherwise, i.e., parties may agree to be bound by terms that are different from existing law. *Id.* (where law provided that liquidated obligations would bear interest from date of maturity and agreement provided that no interest would accrue prior to maturity but was silent as to interest after maturity date, existing law required payment of interest from date of maturity).

Regarding the Agreement at hand, the SOC was part of the existing law at the time the parties entered into the Agreement and when they made amendments to it. Therefore, the law of the State of Georgia requires that the parties abide by applicable existing law, i.e., the SOC, but only as to those matters not addressed in the parties' voluntarily negotiated Agreement. On the face of the Agreement, in Section 4.5.1.5, the parties did address "when" BellSouth would be entitled to conduct an audit and the manner in which BellSouth could initiate an audit. These matters were dealt with by the parties and not left to be determined by existing law.

The parties' intent not to incorporate the whole of the SOC into the Agreement is apparent from the contract language, specifically the language found in Section 4.5 of Attachment 2 concerning conversion of special access services to EELs.[4] For example, Section 4.5.1.2 references the SOC (the June 2, 2000 Order) five times, providing that the term or phrase "significant amount of local exchange service" is as defined in the SOC and that "[t]he Parties agree to incorporate by reference paragraph 22 of the [SOC]." Section 4.5.1.2 further provides that NewSouth's manner of self-certification regarding usage of circuits for local exchange will be the manner specified in paragraph 29 of the SOC. If the SOC in its entirety were automatically read into the Agreement by operation of law as NewSouth contends, these provisions referencing the SOC would be unnecessary, superfluous and without meaning. The definition of a significant amount of local exchange service would have been a given if the parties had intended the SOC to be incorporated into the Agreement. Moreover, Section 4.5.1.2, which pertains to EELs converted from special access (a topic directly addressed in the SOC),

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reliance on a clause of the General Terms and Conditions of the *Nuvox* agreement, providing that the parties agreed to comply with all applicable law, ignores the holding of the *Central Georgia* that specific terms prevail over broad, conflicting general language. See discussion above at p. 7.

[4] To the extent that the references in the Agreement to Sections 251 and 252 of the Act and the language of Section 1.5 of Attachment 2 may have created ambiguity juxtaposed against the audit provisions of Section 4.5 (discussed above at pp. 7-8), the rules of contract construction require the Commission to attempt to ascertain the intent of the parties from the four corners of the Agreement before finding that any ambiguity has left an issue of fact. There will be no question of fact if the intention of the parties is ascertained by applying the rules of contract construction. *See Yargus v. Smith,* 254 Ga. App. 338, 562 S.E.2d 371 (2002); *Harris v. Distinctive Builders, Inc.* 180 Ga. App. 686, 549 S.E.2d 496 (2001); *Travelers Ins. Co. v. Blakey,* 180 Ga. App. 520, 349 S.E.2d 474 (1986). The discussion in this section of the Order meets the Commission's obligation to apply the rules of construction to ascertain the intent of the parties regarding whether specific contract provisions would have precedence over general statements concerning existing law.

demonstrates the parties' intent not to incorporate the entire SOC in their Agreement, but rather to incorporate specific provisions, e.g., paragraph 22 is incorporated into Section 4.5.1.2 by reference. Again, if NewSouth were correct in its position that the whole of the SOC was incorporated into the Agreement, there would have been no need to re-incorporate paragraph 22, a specific part of the SOC. Clearly, when the parties intended to be bound by SOC provisions, they expressly so provided and precisely identified selected portions for incorporation into the Agreement.

It is noteworthy that Section 4.5.2.2 of the Agreement expressly provides that audits of a certain type of special access conversion, agreed on by the parties but not addressed in the SOC, would be "subject to the requirements set forth in the [SOC], except as expressly modified herein." NewSouth maintains that the SOC audit rights had to be specifically referenced since Section 4.5.2.2 audits pertain to a type of EEL not addressed in the SOC. However, the specific SOC reference in 4.5.2.2 again shows that the parties were precise and careful in making references to the SOC—even noting that the SOC would apply except as modified. The level of specificity and the way the parties selectively and carefully made detailed, unambiguous references to the SOC throughout the section of the Agreement regarding EELs is strong indication that the parties did not consider or intend the SOC in its entirety to govern the provisioning of EELs or BellSouth's auditing of them. On the contrary, with regard to matters addressed in the Agreement, the parties intended the SOC to apply sometimes in part, sometimes in whole, and sometimes not at all, depending upon the express provisions of separate subsections of the Agreement dealing with specific situations.

In support of its position regarding the applicability of the SOC to audits of EEL facilities, NewSouth pointed out that BellSouth's initial correspondence giving notice of its intent to conduct an audit stated that BellSouth was acting in accord with the SOC and cited or quoted the SOC several times. The Commission does not find this fact to be probative on the issue of whether the SOC was incorporated into the Agreement. BellSouth did not waive its rights under the Agreement by citing to the SOC or claiming its actions were in accord with the SOC.

In summary, the Commission concludes that the parties to the Agreement did not incorporate the SOC, in its entirety, into the Agreement. Therefore, the specific provisions of Section 4.5.1.5 of Attachment 2 of the Agreement govern "when" BellSouth is entitled to audit NewSouth's EELs and the procedure BellSouth must use to initiate such an audit. BellSouth has complied with the conditions of Section 4.5.1.5 by providing 30 days prior notice to NewSouth and indicating that the audit will be at its own expense. Since BellSouth has not conducted an audit of NewSouth's EELs at any time since the Agreement was executed in 2001, it is not in violation of the only other restriction on its audit rights, that it not conduct an audit of NewSouth's records more than once in any twelve-month period. Accordingly, BellSouth is entitled under the agreed upon terms of the Agreement to conduct an audit of NewSouth's EELs without having to take any further action to justify either its entitlement or its decision to conduct an audit. Notwithstanding this conclusion, the Commission's analysis does not end here.

As stated above, the parties' Agreement governs as to matters specifically addressed in the Agreement, but existing law applies as to matters not addressed in the Agreement. While the Agreement contains provisions regarding when BellSouth is entitled to conduct an audit, it does not contain any provision regarding how an audit will be conducted or regarding the selection of third parties to perform EEL audits. NewSouth has argued that the SOC conditions an ILEC's audit rights on the use of an "independent auditor." The Commission believes that the SOC provides the appropriate criteria regarding the minimum qualification standards for a third party hired to conduct an EEL audit, inasmuch as the Agreement is silent on this issue.

In the SOC, the FCC relied on and sanctioned the stated agreement between ILECs and CLPs that independent auditors should be used to perform audits of EEL usage.[5] Though the SOC did not define the term "independent auditor," the word "auditor" is commonly understood in business and law to mean a professional skilled in conducting audits, who is licensed by a recognized profession and subject to a code of conduct requiring a high level of independence.[6]

BellSouth has chosen American Consultants Alliance ("ACA") to conduct the audit of NewSouth's EELs. Through the affidavit of its Assistant Vice President – Pricing, Jerry Hendrix, BellSouth represents that ACA is not subject to BellSouth's control or influence. In communications of record with the FCC, BellSouth represented that prior to hiring ACA to conduct EEL audits of approximately 13 CLPs, including NewSouth, BellSouth had no relationship with ACA. The Commission finds that, subject to the SOC's requirement that a third party selected to perform an EEL audit must be an "independent auditor," the selection of the third party auditor is a matter for BellSouth. BellSouth is not required to consult with or seek the approval of NewSouth, the party being audited. Similarly, BellSouth is not required to obtain the Commission's approval of its choice of an auditor. In choosing a third party to audit NewSouth's EELs, BellSouth is advised to give due consideration to the "independent auditor" requirement. If ACA's audit uncovers NewSouth's alleged non-compliance with local usage certifications and BellSouth files a complaint with the appropriate Commission pursuant

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[5] BellSouth was a signatory to the letter conveying this agreement to the FCC. *February 28, 2000 Joint Letter* (filed *ex parte* on February 29, 2000), CC Docket No. 96-98.

[6] *In the Matter of Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, ¶ 626 (2003) ("Triennial Review Order" or "TRO"), issued after execution of the Agreement, the FCC affirmed its prior sanctioning of the parties' agreement to conduct audits using independent auditors. The FCC also ruled that the independent auditor must perform its audit in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA"). This requirement that the audits conform to AICPA standards was not part of the SOC and, in its TRO, ¶ 622, the FCC acknowledged that it was adopting auditing procedures "comparable" to but in some respects different from those in the SOC. Nevertheless, although requirements newly imposed by the TRO may not apply to audits conducted pursuant to interconnection agreements entered prior to issuance of the TRO, the FCC's affirmation of the requirement that an "independent auditor" conduct EEL audits and its ruling regarding adherence to AICPA standards provide highly persuasive corroboration that the FCC intended the SOC to require, at a minimum, that a licensed professional perform EEL audits.

to Section 4.5.1.5 of Attachment 2 of the Agreement, the credibility of the auditor as well as the credibility of the auditor's work is subject to challenge and may be offered as a defense to any such complaint.

CONCLUSION

Having complied with the requirements of Section 4.5.1.5 of Attachment 2 of the Agreement, BellSouth is entitled to audit NewSouth's records in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. BellSouth is not required to make any further or additional showings regarding entitlement to audit NewSouth's records under the Agreement in advance of the audit. While a third party selected to conduct an EEL audit is required by the FCC's SOC to be an independent auditor, the selection of the third party is a matter for BellSouth that is not subject to NewSouth's or the Commission's approval, at least in the first instance. Any challenge regarding the auditor's qualifications or allegations of bias is properly reserved for a complaint proceeding initiated under Section 4.5.1.5 pursuant to the dispute resolution process of the Agreement.

IT IS, THEREFORE, ORDERED as follows:

1. That NewSouth's motion for oral argument is denied;

2. That NewSouth's request for a full evidentiary hearing is denied;

3. That BellSouth's request for summary disposition is allowed;

4. That BellSouth has met the requirements of Section 4.5.1.5 of Attachment 2 of the Agreement and is therefore entitled to audit NewSouth's records to verify the type of traffic being transmitted over EEL circuits; and,

5. That NewSouth shall permit BellSouth's chosen auditor to conduct the audit as previously noticed by BellSouth and the audit should begin no later than 45 days from the date of this Order.

ISSUED BY ORDER OF THE COMMISSION.

This the 24th day of August, 2004.

NORTH CAROLINA UTILITIES COMMISSION

Patricia Swenson

Patricia Swenson, Deputy Clerk

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